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Supreme Court of the United States,

OCTOBER TERM, 1920.

No. [redacted]86

FEDERAL TRADE COMMISSION,

Petitioner,

against

THE CURTIS PUBLISHING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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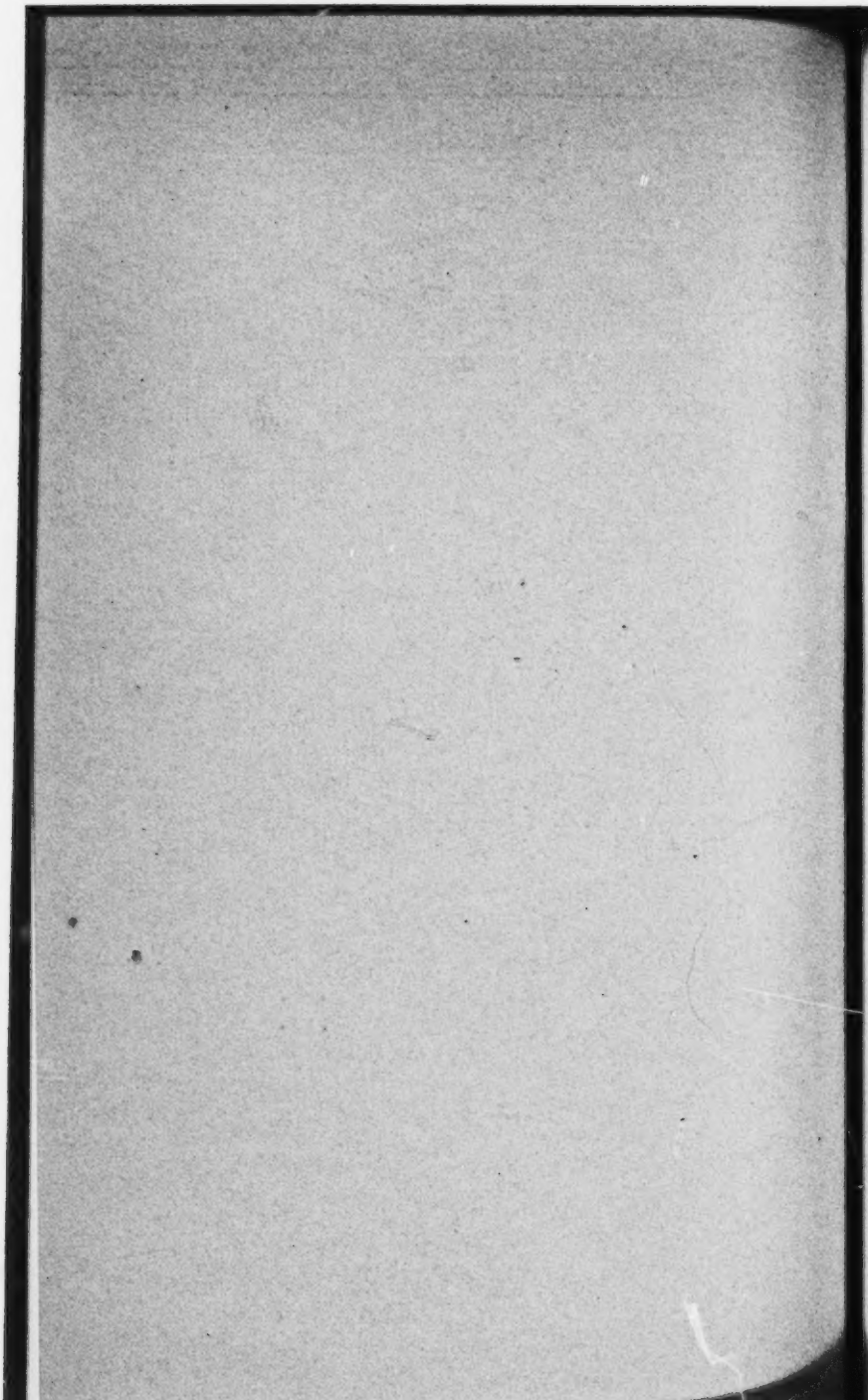

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The Supreme Court of the United States,

OCTOBER TERM, 1920.

No. .

FEDERAL TRADE COMMISSION,
Petitioner,

AGAINST

THE CURTIS PUBLISHING COMPANY,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

This proceeding grew out of an attempt by two magazine publishing companies to obtain, without any expense to them, the services and benefit of a unique and efficient distributing organization originated by the respondent twenty years ago and built up by it, at great labor and expense, for the exclusive distribution of its own publications; and it was upon the complaint of one of these publishing companies that the Federal Trade Commission brought this proceeding. These two publishing companies had previously used other efficient channels of distribution through which they had built

up large circulations for their magazines, and they have at all times had adequate means of distributing their magazines to the retail dealers and the public without encroaching upon the respondent's exclusive distributing organization.

Neither the petition for the writ of *certiorari* nor the brief accompanying the petition adequately or correctly states the facts of the case, or the real questions involved in the decision of the Court below. The Petitioner purports to state the facts of the case, which covered three thousand four hundred pages of printed testimony in the Court below, on two pages of its petition, utterly ignoring all of the basic and fundamental facts, which were uncontradicted, and which were considered by the Court below and are set forth at length in its opinion.

The same disregard of the fundamental facts of the case was exhibited in the Commission's findings of fact, as to which Judge Buffington, writing the opinion of the Court below, stated (p. 5, Appendix submitted herewith):

> "An examination of these findings of fact shows that no findings whatever have been made in reference to the greater part of the vast volume of testimony in this case, and it therefore becomes the duty of this Court, with a view to giving the due effect to such testimony, to here recite what the proofs disclose as to the operations of the defendant company in those matters in which there has been no finding of fact by the Commission."

In view of the insufficient statement of the case by the Petitioner, we deem it necessary to succinctly state the facts and the issues actually decided, being convinced that once the actual case is clearly stated, the Court will perceive that no principle of justice has been violated, no rule of law disregarded, and that this is not a case of a character in which this Court will issue a writ of *certiorari*, under its established practice.

For convenience of reference, we submit herewith as an Appendix a printed copy of the opinion of the Circuit Court of Appeals in this case.

The Facts.

The origin and growth of the respondent's distributing organization and of the contract attacked in this case are, briefly, as follows:

The Curtis Publishing Company, the respondent, publishes the Ladies' Home Journal, the Saturday Evening Post and the Country Gentleman. These periodicals have a large circulation throughout the United States which has been built up in large measure through the efficiency of the respondent's distributing organization. The details of this organization and of its creation are fully set forth in the opinion of the Court below (pp. 8-21 of Appendix). It was originated by the respondent in 1899, at a time when all magazines and periodicals were being distributed through the American News Company,

which was the sole distributing agency for magazines and periodicals. The respondent had acquired the Saturday Evening Post in 1897, and in 1899 conceived the idea of distributing it through school boys throughout the country. The respondent found it difficult to keep in touch with these boys from the home office, and in 1901 it appointed district distributing agents in various localities, through whom its publications were distributed to the boys, and who were likewise charged with the duty of recruiting and supervising the boys.

At that time there were no wholesale distributors of magazines in existence, as all magazines and periodicals were distributed throughout the country by the American News Company (p. 1341—record).

These district agents, up to 1910, distributed the Saturday Evening Post only to the respondent's boys; the retail dealers throughout the country being supplied with the Saturday Evening Post and the Ladies' Home Journal through the American News Company (p. 1341—record). In 1910, these district agents were also used to distribute the respondent's publications to the retail dealers.

At this time, in 1910, the respondent's district agents wholesaled no magazines or periodicals except the respondent's two magazines and were, in no sense, general magazine wholesalers, and in that year the respondent had in all about 1,700 of these district agents; about 85% of whom had formerly been boys

selling the Saturday Evening Post, or were small retail dealers (pp. 1345-1346—record).

This distributing organization has been developed and maintained by the respondent at great expense, and at the present time consists of approximately 1,500 district agents and about 35,000 boy distributors, and is costing the respondent about a million and a half dollars a year to maintain.

The duties of these district agents include, in cooperation with the respondent, the maintaining of the staff of the organization of boys, the coaching and training of the boys; the ordering of the copies for distribution and supplying the boys with such copies, supplying retail dealers with copies for sale, and making complete weekly and monthly reports showing in detail the names of the boys and the names of the retail dealers to whom copies are distributed and the specific numbers sold by each (pp. 1330, 1349, 1351—record).

The respondent's method of distribution as a whole comprises the joint activities of its district agents and boy distributors, each dependent upon the other for the proper distribution of its publications.

As stated by the Court below (p. 20, Appendix):

> "The proofs show that the Curtis Company expended in the maintenance of district agents and boys in the four years, 1914 to 1917, both inclusive, over five and a half million dollars, and they abundantly satisfy us that this method of distribution is an entity made up of the joint activity and personal coöperation of district distributing

agents and boy distributors and their relationship to the Curtis Company, each one of the three being dependent upon the other two for the proper coöperating and inter-related distribution of the respondent's publications and promptly furnishing the same to the reading public and that this plan originated with, and was built up by, the Curtis Company through years of patient effort and at great expense, and that it forms the basic, practical method of distributing and marketing the Curtis Company's publications and is a business asset of great value, *and that the vital and basic element in this business is the undivided loyalty and personal interest and influence of the distributing agents.*" (Italics ours.)

The Origin of the Respondent's Contract with its Agents.

In 1910 an attempt was made by a magazine publisher to use and get the benefit of the entire distributing organization of the respondent, without its consent; and in 1911 the respondent, in order to protect its organization against such attempts in the future, adopted a contract with its district agents which provided that they should not wholesale other magazines to the boys or dealers without first obtaining the respondent's approval (pp. 172, 1397—record).

In 1917 the Pictorial Review Company, which publishes the Pictorial Review, and the Crowell Publishing Company, which publishes three magazines, began and carried on an active campaign to obtain, without any expense to them, the use of the respondent's entire distributing organization of agents and school boys, for

the distribution of their publications, and resorted to various unlawful, objectionable and demoralizing methods in endeavoring to persuade the respondent's agents to handle their publications. The details of this attempt to appropriate the respondent's entire organization are set out in the opinion of the Court below (pp. 22-40—Appendix).

Upon the respondent's refusal to permit its distributing organization to be appropriated by these publishers, the Pictorial Review Company made a complaint to the Federal Trade Commission. While the matter was under consideration by the Trade Commission and before it had issued a complaint, that Company filed a bill in equity against the respondent in the United States District Court for the Southern District of New York, charging that the respondent's contract with its district-agents was in violation of Section 3 of the Clayton Act, and asking for an injunction to restrain the respondent from continuing the use of and from enforcing said agreement.

In denying the Pictorial Review Company's application, the Court said, in part, as follows:

> "What complainant evidently desires is not merely to sell to these wholesalers, which it can do already in cases where the wholesalers have a retail trade, and to the extent of that retail trade; but to avail itself of the organization of the Curtis boys, built up by the ingenuity, labor and capital of the defendant. The defendant in insisting upon maintaining the integrity of its system is not in my opinion guilty of unfair trade. On the con-

trary, the complainant in attempting to avail itself of this system is engaging in unfair trade."

Pictorial Review Co. vs. *Curtis Publishing Co.*, 255 Fed., p. 209.

In view of certain comments of the Court on the *form* of the respondent's contract, the respondent adopted a new form of agency agreement, conforming precisely to the relation that existed between it and its district agents, which contains a provision that, without the written consent of the publisher, the district agent "will not * * * act as agent for or supply at wholesale rates any periodicals other than those published by the publisher."

The new form of agency agreement is the only one now in use, and is set forth at pages 1294-1303 of record.

The respondent's district agency agreements have never applied to or affected the retail dealers in magazines; nor has the respondent ever prevented its district agents from retailing any magazines or periodicals they desired to handle.

When the Pictorial Review Company and the Crowell Company found they could not induce the responent's agents to break their contracts with the respondent, they obtained other persons who were already wholesaling magazines, or retailers of various kinds who were willing and equipped to wholesale magazines, to act as wholesalers for their publications throughout the entire country, through whom they

have been able to wholesale and freely circulate and distribute their publications, and through whom, as the testimony showed, the circulations of their magazines have steadily increased (p. 41—Appendix; pp. 185, 267, 3401—record).

We desire to emphasize the fact that this is not a case where the respondent has sought out an established and limited class of dealers or wholesalers throughout the country, and put them under its contract and obtained their services to the exclusion of others, as the petition seeks to make it appear. The uncontradicted testimony shows that there were in fact no wholesalers of magazines in existence when the respondent first appointed agents to act as its wholesalers; and that a large majority of the respondent's wholesale distributors were actually started in the magazine business by the respondent and had never before wholesaled any magazines or periodicals whatever; the testimony showing that only 102 of the respondent's present district-agents were wholesaling other magazines or periodicals at the time they were appointed the respondent's agents (pp. 3221, 3222—record); and as to these 102, the respondent *has never attempted to prevent or in any way to interfere with the handling of such other magazines by its agents* (pp. 1415 and 785—record).

I.

The respondent has never prevented any distributor of magazines from continuing to distribute such magazines as he had handled before he became the respondent's agent; nor has it ever closed to its competitors any channels of distribution previously used by them.

The whole petition is founded on assertions to the effect that the respondent has in a large number of instances entered into contracts with wholesale dealers *already engaged* in the sale or distribution of magazines or newspapers of other publishers, and has *thereafter prevented* such dealers from continuing to sell and distribute such magazines of other publishers as they previously handled, and that it had thereby "closed established channels for the distribution of magazines". In fact, practically the whole argument in support of the petition is based on this assumption of facts.

There is no basis whatever for any such contention in this case. The record shows by uncontradicted testimony that the respondent not only has not made a practice of such business methods, but that it has never in a single instance prevented one of its agents from handling a magazine or periodical he previously had handled (pp. 1415 and 785—record).

The only magazines of the 400 published in the United States that the respondent has refused permission to its agents to handle are the Pictorial Review

and the Crowell publications, and there is not a single instance, shown by the record, of the respondent appointing as its agent a dealer who was at the time wholesaling the publications of either the Pictorial or Crowell companies. Furthermore, the testimony is uncontradicted that the respondent permitted many of its agents to handle the magazines of these publishers when they ceased distributing through the American News Company, and that it was not until the respondent discovered that the Pictorial and Crowell companies were endeavoring, by misrepresentations and other underhand methods, to undermine the loyalty of its agents and obtain the use of its boy organization that the respondent refused to permit its agents to continue to wholesale the publications of these two companies.

II.

The scope and effect of the Commission's order.

The petition and brief misapprehend to a marked degree the scope and effect of the order of the Commission which was reversed.

The Petitioner asserts that the order applied to and affected only a small portion of the respondent's district agency force, that is, those who were handling the *"periodicals"* of other publishers at the time they became the respondent's agents, leaving the respondent free to use its contract with all others who were not handling the *"periodicals"* of other publishers.

The Petitioner states at page 15 of its brief:

> "Respondent's distributors who had not been engaged in handling the *periodicals* of other publishers at the time respondent contracted with them, including all of the respondent's school boy organization, are not affected by the order."

The Petitioner states further at page 16:

> "The Commission's order allows respondent to use all of its present distributors, provided that the 447 who were already engaged in selling the *magazines* of other publishers when respondent contracted with them be allowed to resume selling them; or respondent may secure new distributors to take their places who are not engaged in handling other publishers' *periodicals.*"

We call particular attention of the Court to the use of the words "periodicals" and "magazines" in the above statements of the scope of the order.

Let us see just what the Commission's order did prohibit the respondent from doing. It was as follows:

> "Now, therefore, it is ordered that the respondent Curtis Publishing Company * * * cease and desist * * * from *entering into* any contracts, agreements or understandings with persons, partnerships or corporations *already engaged* in the sale or distribution of the *magazines or newspapers, or both,* of other publishers, which provide that such persons, partnerships or corporations shall not act as agents for, or sell, or supply to others at wholesale rates, any periodicals

other than those of respondent without the written consent of respondent;

and from *entering into* any contracts, agreements or understandings with persons, partnerships or corporations *already engaged* in the sale or distribution of the *magazines or newspapers, or both,* of other publishers which provide that such persons, partnerships or corporations shall not sell or distribute or shall not continue to sell or distribute the magazines or newspapers, or both, of other publishers;

and from *enforcing any provision which may be contained* in any of respondent's present outstanding contracts with persons, partnerships or corporations *now engaged* in the sale or distribution of *magazines or newspapers, or both,* of other publishers which provide that such persons, partnerships or corporations shall not sell or distribute the magazines or newspapers, or both, of other publishers, or shall not sell or distribute the magazines or newspapers, or both, of other publishers without the written consent of respondent" (italics ours) (p. 94—record).

This order prohibited the respondent, in clear and unmistakable language, from enforcing its contract with any and all of its present agents "*now engaged* in the sale or distribution of magazines *or newspapers,* or both, of other publishers", regardless of whether such agents had wholesaled the respondent's magazines before taking up the wholesaling of other magazines or newspapers.

It should be noted in this connection that such

of the respondent's agents who may be wholesaling *newspapers or a single newspaper,* but no other magazines except respondent's, are taken away from respondent by this order, as well as such agents who may have undertaken to wholesale a *single magazine since they became the respondent's agents.*

The Commission's order went even further, and prohibited the respondent from *entering into* any such contracts in the future with persons "already engaged in the sale or distribution of the magazines *or newspapers, or both,* of other publishers", so that, under this order the respondent cannot appoint as its agent for the distribution of its periodicals a person who is engaged in the sale or distribution of a single newspaper, *even though such person does not handle and never handled magazines.*

A further effect of this order is that if the respondent has an agent who, at the time of his appointment some years ago, was not wholesaling either magazines or newspapers, but who *after becoming the respondent's agent has undertaken to wholesale a single daily newspaper,* but no other magazines or periodicals, the respondent's existing contract with such agent is prohibited and must be cancelled; and the same is true if such agent should undertake to wholesale one other magazine, even though there may be other well established and efficient wholesalers of magazines in the same locality.

Such statements in the petition and brief as to the scope and effect of the order are refuted by the order

itself which is before this Court; and the statement in the Brief, at page 14, "that the Court in reversing the Commission's order, did so upon a misconstruction of the unfair method of competition which the order prohibited" is a practical repudiation of the order in an effort to avoid its drastic, sweeping and unfair prohibitions which the Circuit Court of Appeals held could not be permitted to stand.

III.

The contract involved is a contract of agency in form, operation and effect.

We deem it sufficient to say, in reply to the Petitioner's claims as to the character of the respondent's contracts with its district-agents, that the respondent's contracts have been considered, passed upon and their character determined by two United States Courts, both of which have held that they were not contracts of sale, and were not in violation of the Clayton Act.

The United States District Court for the Southern District of New York so held in *Pictorial Review Co.* vs. *Curtis Publishing Co.*, 255 Fed. p. 206; its comment on the character of the contract is referred to on page 19 herein. And the Circuit Court of Appeals, in the present proceeding, has also so held. Judge Buffington, in this connection, after commenting on the scope of the Clayton Act and on the general char-

acter of the respondent's contracts, states as follows (p. 49, Appendix):

> "Nor is the fact to be overlooked that the contract, taken as a whole, could not be satisfied by the mere fact of sale to a buyer, for, if the transaction ended with a sale by the publisher, the whole spirit and purpose of the contract would be lost, which is that the distributing agent should distribute to the boys and the boys distribute to their personal customers. * * * It has therefore seemed to us that the unique character of the subject-matter of this contract, the object the publisher had in view, and the phraseology, conditions, and obligations of this contract, *unite to make the contract one of consignment to a distributing agent, who was furthering the business of his principal, and not one of a buyer, who thereby acquires title for his own individual purposes*" (italics ours).

The contract now in use is "District Agency Agreement, Form JDA8", set forth at pages 1294-1303—record, as Commission's Exhibit 189.

In this contract there is no provision requiring payment in advance by the district agent or limiting the amount of returns of unsold copies; but it provides that the title to the respondent's publications "shall remain with the publisher until they are sold by the District Agent", and the district agent is not charged with any copies not sold by him, but is permitted to return to the publisher all unsold copies of the several publications (pp. 1930, 1940, 1946—record). The district agent

does not pay for the copies delivered to him, but is allowed and paid by the respondent a stated commission on the copies actually sold by him. The district agent guarantees, however, that he will sell a minimum number of copies of each publication, a provision quite usual in agency contracts, but he is not charged for any copies unsold below the specified number (pp. 1930, 1940, 1945-1946—record). His failure to sell the specified number of copies merely constitutes a failure to comply with one of the terms of his agency agreement.

IV.

There is no conflict between the decisions of the various courts referred to in Petitioner's Assignments of Error Nos. 1, 2, 3 and 4.

The petition asserts that a review by this Court is necessary in order to avoid and correct a conflict between the decision in this case and the decisions in the cases of *Dr. Miles Medical Co.* vs. *Park & Sons Co.*, 220 U. S. 373; *United States* vs. *Keystone Watchcase Co.*, 218 Fed. 502; *Standard Fashion Co.* vs. *Magrane Houston Co.*, 259 Fed. 793; and *Pictorial Review Co.* vs. *Curtis Publishing Co.*, 255 Fed. 206.

In the case of *Dr. Miles Medical Company* vs. *Park & Sons Co.*, 220 U. S. 373, it appears that the Dr. Miles Medical Company had two forms of restrictive agreements, one made with the wholesale druggists and the other with 25,000 retail dealers in the

United States, and it thereby sought to maintain prices for all the sales of its products, both at wholesale and at retail; and the ground on which this Court condemned that arrangement was that the system and method of contracts and sales was "a system of interlocking restrictions by which the complainant seeks to control, *not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail*" (italics ours) 220 U. S., p. 399. No such contracts as were involved in that case, nor such system as was condemned, exist in the present case, as clearly appears from the opinion of the Court below.

In reference to the case of *United States* vs. *Keystone Watchcase Co.*, 218 Fed. 502, there is no analogy between the facts in that case and in the present case. It clearly appeared in that case that the relation of principal and agent did not exist between the Keystone Company and the jobbers or wholesalers, but it was held that the jobbers were merely customers who bought outright from the Keystone Company; and it further appeared that the Keystone Company had interfered with jobbers who were "already established customers, not only of the defendant company, but also of its competitors, and had already become trade outlets for every manufacturer of cases whose wares they had been accustomed to buy". No such situation exists in the present case, as the record is clear that where the respondent has appointed as its agent

a person who had previously been wholesaling magazines or periodicals, it has never attempted to prevent such agent from continuing to wholesale such magazines or periodicals as he previously handled (pp. 1415 and 785—record).

In *Standard Fashion Company* vs. *Magrane Houston Co.,* 259 Fed. 793, the contract involved was clearly a sales contract *with retail dealers,* and was so held by the Court, and it came squarely within the prohibition of the Clayton Act, it appearing that full title passed to the retail dealer under the contract, and that he was selling his own goods to his own customers. It further appeared that the sales contract in that case *affected more than 20,000 retail dealers.* This decision is in no way applicable to the facts in the present case. The respondent has no contracts with retail dealers limiting their retail trade and the contract that it has with its district agents is not in form or essence a contract of sale.

The case of *Pictorial Review Company* vs. *Curtis Publishing Company,* 255 Fed. 206, is in no way in conflict with the decision of the Circuit Court of Appeals in this case. On the contrary, the Circuit Court of Appeals in its opinion herein refers to the decision in the *Pictorial Review* case, stating (p. 54, Appendix) as follows:

> "An examination of that case shows that, upon facts which in no wise controverted the fact findings of the Commission heretofore set forth, that Court held the Curtis Company's course did not

constitute unfair business competition. *We see no reason to differ from the conclusion reached by that Court,* and, unappealed from as it is, it judicially and finally adjudged that as between these companies the Curtis Company has not been guilty of unfair competition in business" (italics ours).

Nor is there any conflict between the decision in the *Pictorial Review Company* case and the present case as to the character of the contracts involved here, for in that case the Court, in commenting on the form of the respondent's contract then in force, stated as follows:

> "The principal reason, doubtless, for selling the magazines to the district agents, rather than making consignments, with consequent financial risks, is one of safety and simplicity, and is not sufficient, in my opinion, to subject the relations of the parties in all respects to those of mere vendor and vendee. * * * Looking behind the form of the contract which the defendant makes with its agents to the inherent features of the transaction, I think it may be said that the selling arrangement more nearly resembles an agency conducted by district agents in coöperation with the Curtis boys than it does an outright sale to the district agents and nothing more."
>
> *Pictorial Review Company* vs. *Curtis Publishing Company,* 255 Fed., pp. 209, 210.

V.

The Court below had jurisdiction to consider the whole case as shown by the record in determining the question of unfair competition, where the Commission had ignored essential and material facts which were undisputed.

It is contended by the petitioner that the Court below had no power, in reviewing the Commission's order, to consider the whole record, and that the Court could consider only the facts found by the Commission, regardless of whether those facts were sufficiently comprehensive to cover the evidence and the issues involved in the case.

The language of the Act, giving the Circuit Courts of Appeals of the United States the power to review orders of the Commission, warrants no such construction as is urged by Petitioner; on the contrary, it provides that upon a review "the Court shall have jurisdiction of the proceeding *and of the question determined therein,* and shall have power to make and enter upon the pleadings, *testimony and proceedings* set forth in such transcript a decree affirming, modifying or setting aside the order of the Commission" (Act of Sept. 26, 1914, c. 311. 38 Stat. 717).

When the Federal Trade Act provided that the findings of the commission as to the facts, if supported by testimony, should be conclusive, it clearly meant that the Commission should make adequate findings of fact

covering the material and essential features of a case, and it was never intended to limit the reviewing power of the Circuit Courts of Appeals on questions of unfair competition to a consideration of only such restricted portions of a record as the Commission might see fit, for any reason, to limit its findings to.

The Circuit Court of Appeals refused to be bound to any such limitation on its reviewing power, on the broad principle that while the statute made the findings of fact of the Commission conclusive if supported by evidence, such findings were conclusive only so far as they went, and that when other undisputed material facts appeared which qualified and explained those found by the Commission, the Court had not only the power but it was its duty to look into the whole record and determine the case upon all of the facts, rather than upon a mere isolated phase based on a small portion of the testimony taken.

Judge Buffington, in his opinion below, stated as follows (p. 5, Appendix):

> "An examination of these findings of fact shows that no findings whatever have been made in reference to the greater part of the vast volume of testimony in this case, and it therefore becomes the duty of this court, with a view to giving due effect to such testimony, to here recite what the proofs disclose as to the operations of the defendant company in those matters in which there has been no finding of fact by the Commission. And

indeed, in our opinion, such an examination and the ascertainment of the facts of such prior business dealings of the respondent company, is absolutely essential to a full understanding and a just determination of this case."

The Court below, after reciting the uncontradicted facts as shown by the record, and stating the general power of the courts in reference to questions of unfair competition, then stated as follows (pp. 51-56, Appendix):

"Such, then, being the existing and by the Act unchanged jurisdiction of such courts in reference to questions of unfair competition between business competitors generally, and that jurisdiction being exercised on well-established legal principles, it follows that when Congress invoked an exercise of supervisory power on the part of such courts over the action of the Trade Commission, and enacted that this supervisory power should be exercised before the orders of the Trade Commission could be enforced, it would seem to follow that the supervisory powers which the Court was meant and intended to exercise, were the usual powers exercised in the usual way by those courts when exercising their power to review, and while the Act provided that the findings of fact made by the Commission were final and conclusive, it still remained the duty of the supervising Court to determine the same legal questions which a supervising court had in reviewing actions of the trial court, namely, whether under all the facts found by the Trade Commission a case of unfair business

competition was established. * * * Manifestly, Congress did not mean to confer upon the Trade Commission the power to grant injunctions in cases of business competition, where courts would not be justified in granting injunctions. Indeed, when Congress in invoking such reviewing and supervisory power, said 'the Court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter *upon the pleadings, testimony and proceedings* set forth in such transcript, a decree affirming, modifying or setting aside the order of the Commission,' it was using language which aptly described the customary jurisdiction and power theretofore exercised by Circuit Courts of Appeals in reviewing cases of alleged unfair business competition.

Such, then, being the supervisory jurisdiction conferred on this Court, we turn to the question before us and inquire whether the record as a whole, which includes not only the findings of fact made by the Commission, but also the proofs in regard to which the Commission made no findings, discloses a case of unfair business competition on the part of the Curtis Company, which warrants a decree which in effect enjoins them from successfully continuing a distributing and selling agency they have utilized for years. * * *

* * * Now, it is very apparent that where the supervisory review by the Circuit Court of Appeals which Congress invoked, provided that that Court ' shall have power to make and enter *upon the pleadings, testimony and proceedings* set

forth in such transcript, a decree,' it is the province and indeed the duty of the reviewing court, to consider not merely the findings of the Commission but the whole record, the whole proofs and the whole proceeding, and to say first, whether in view of all the proofs, the limited facts found by the Commission really passed on the pertinent and decisive facts, and so warranted an injunction; and second, if such limited facts do not reach the merits and do not alone legally justify and warrant a decree of unfair competition and injunctive relief, then since Congress has enacted that the Circuit Courts 'shall make and enter *upon the pleadings, testimony and proceedings* set forth in such transcript, a decree affirming, modifying or setting aside the order of the Commission,' it is quite clear that it is not only the province but the duty of the Circuit Court of Appeals and indeed the expressed purpose of Congress that such reviewing Court should itself examine the pleadings, the entire testimony and proceedings, and upon such inclusive examination, determine whether the facts found by the Commission and the proofs on which the Commission made no findings and which the Court, in the absence of such finding, itself finds and determines, legally established a case of unfair business competition by the Curtis Company."

The cases of *United States* vs. *Adams,* 76 U. S. 661 and *United States* vs. *Ripley,* 220 U. S. 491, cited in petitioner's brief in support of the argument that the Circuit Court of Appeals should have sent the case back to the Commission for further findings on the facts,

have no application to a review of the orders of the Federal Trade Commission.

Both of the cases referred to involved appeals from the Court of Claims to the United States Supreme Court, which are regulated by Special Rules of the Supreme Court adopted in 1866.

Under these rules, only the findings of fact by the Court of Claims and its conclusions are certified to the Supreme Court, *but not the evidence taken in the case;* so it was necessary in the cases cited, where the findings were insufficient or inadequate, to send the case back to the Court of Claims for further findings *upon the evidence which remained in that court.*

In *United States* vs. *Anciens Establissements,* 224 U. S. 309, at page 329, this Court held that the evidence taken before the Court of Claims could not be certified up to the Supreme Court.

There is no such limitation with respect to a review by the Circuit Courts of Appeals of orders of the Federal Trade Commission, for the statute requires that "a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission" shall be filed in the Circuit Court of Appeals, and that such Court "shall have power to make and enter upon the pleadings, *testimony and proceedings set forth in such transcript,* a decree, etc." Therefore, the practice contended for by Petitioner of sending the case back to the Commission for further findings could not have been adopted by the Circuit Court of Appeals under the statute, as such

Court was specifically charged with the duty of considering the testimony as well as the pleadings and other proceedings in making its decree.

It is respectfully submitted that the case has already been disposed of on the facts; that the questions of law alleged to exist are not involved in the case at all; and that the petition should be denied.

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